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No. 105, Original

In The
Supreme Court of the United States
October Term, 1994

STATE OF KANSAS,

Plaintiff,

v.

STATE OF COLORADO,

Defendant.

ON EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

BRIEF OF THE STATE OF WYOMING AS *AMICUS CURIAE*

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The State of Wyoming submits this brief as *amicus curiae* pursuant to Sup.Ct.R. 37.5. This brief is submitted in compliance within the time permitted for exceptions to the Special Master's Report. *Kansas v. Colorado*, 115 S.Ct. 48 (1994); Sup.Ct.R. 37.3.

INTEREST OF THE STATE OF WYOMING AS *AMICUS CURIAE*

The State of Wyoming is the defendant in the pending original action brought by the State of Nebraska to modify the Court's North Platte River Decree, *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953). *Nebraska v. Wyoming*, No. 108 Original. In addition, Wyoming is a party to

both interstate compacts and Court decrees governing the use of its waters. *E.g.*, *Yellowstone River Compact*, 66 Stat. 663 (1951); *e.g.*, *Wyoming v. Colorado*, 259 U.S. 419, 496, *modified*, 260 U.S. 1 (1922), *vacated and new decree entered*, 353 U.S. 953 (1957). Therefore, the State of Wyoming has a direct interest in the proper and equitable administration of water rights on an interstate basis.

The Special Master's Report in this case includes a discussion and a recommendation with regard to the standard of proof necessary to prevail in interstate water allocation suits before this Court. Special Master's Report at 65-70. To the extent that discussion could be read as a recommendation that the Court reconsider the traditional high burden of proof most recently repeated and applied in *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993), Wyoming takes exception to that recommendation. Wyoming's brief is directed solely toward the Special Master's discussion of the burden of proof in cases involving the equitable apportionment of interstate streams. Wyoming does not address the factual matters contained in the Special Master's Report.

SUMMARY OF ARGUMENT

The State of Wyoming is the defendant in a pending original action in which the Court has announced that it will rely on well-established precedent to require proof of real and substantial injury by clear and convincing evidence before exercising its extraordinary power to limit or restrict Wyoming's sovereign power over its portion of an interstate stream. As a result, Wyoming finds no merit or support for the recommendation that the Court relax the standard of

proof imposed in interstate water disputes. The Court established the standard of proof in recognition of the dignity and status of the parties as sovereign states. The Court should retain the standard in order to prevent the compromise of the rights of states except in the most necessary situations. Moreover, in the nearly ninety years since the precedent was established, states have come to expect that they must meet a high standard of proof, both to invoke the Court's jurisdiction and to obtain relief in such cases. Any change in the standard could have a substantial effect on the number of cases filed to invoke the Court's original jurisdiction.

ARGUMENT

IN AN ACTION BETWEEN STATES THE STANDARD OF PROOF SHOULD REMAIN ELEVATED WHEN THE REMEDY SOUGHT WOULD ALTER THE RIGHTS OF THESE STATES

The Special Master's Report contains a brief section on the standard of proof in this proceeding. Report of the Special Master, Section VIII, pp. 65-70. However, the conclusion reached in those five pages affects enormously the remainder of the questions the Special Master addresses in his report and, if adopted, could change the rules in equitable apportionment cases within the Court's original jurisdiction.

The Special Master recommends that Kansas be required to prove its case by only a preponderance of the evidence. Special Master's Report at 70. However, the Special Master does not limit his discussion of the issue to the controversy at hand. His commentary on the

development of the standard of proof touches upon all interstate original jurisdiction water rights litigation. Much of his discussion traces the development of the clear and convincing evidence standard of proof applied by the Court to equitable apportionment of interstate streams. Special Master's Report at 65. *See, e.g., Idaho v. Oregon*, 462 U.S. 1017, 1027 (1983). He then concludes that there is no real explanation for the clear and convincing evidence standard in original jurisdiction actions. Special Master's report at 66, 68.

Included in the discussion is an unsupported perception that geography and gravity may compound an inherent unfairness to applying the standard in apportionment proceedings:

> Second, on an interstate stream, the downstream state will normally be the complaining party. As such it will also invariably be the party which is required to present a very strong case in order to obtain relief. In contrast to actions involving private water rights, the Court's special rule for burden of proof in equitable apportionment cases adds a significant legal inequality to the natural inequality already imposed by geography. The ideal of federalism - that each state is on an equal footing with all other states - seems poorly served by a rule which routinely penalizes all downstream states.

Special Master's Report at 68-69.

The Special Master overlooks that the reason for the heightened standard in original actions relates to

the nature of the litigants: states that enjoy sovereignty limited only by the U.S. Constitution. *Gulf Offshore Co. v. Mobil Oil Co.*, 453 U.S. 473, 478 (1981). In recognition and respect of that sovereignty, the Court restricts the exercise of its jurisdiction over the states to controversies of a serious magnitude. The Court will not exercise its original jurisdiction over states except in cases of absolute necessity. *Alabama v. Arizona*, 291 U.S. 286, 291 (1934). The Supreme Court's original jurisdiction provides an alternative to settling important controversies between sovereigns that traditionally could be settled only through diplomacy or war. *North Dakota v. Minnesota*, 263 U.S. 365, 372-73 (1923), *Nebraska v. Wyoming*, 325 U.S. at 608, *Mississippi v. Louisiana*, 113 S.Ct. 549, 553 (1992).

The heightened standard of proof expresses the Court's policy that the controversies between states within its original jurisdiction have a certain dignity and seriousness. The Court applies the higher standard to limit the cases it hears and to guide the use of its extraordinary power in those cases it accepts in its original jurisdiction. The nature of the parties, whether states or private litigants, directly bears upon the burden and quantum of proof. *Washington v. Oregon*, 297 U.S. 517, 529 (1936). The fact that these disputes are not ordinary lawsuits between individuals, but controversies between states, involving grave questions of public law, has guided the Court in its determinations. *Virginia v. West Virginia*, 234 U.S. 117, 121 (1914). Before the Court will act, a threatened invasion of rights must be of serious magnitude and established

by clear and convincing evidence. *Wyoming v. Oklahoma*, 502 U.S. 437 (1992). As the Court noted in *Colorado v. Kansas*, 320 U.S. 3823(1943):

> The question must be answered in the light of rules of decision appropriate to the quality of the parties and the nature of the suit. In such disputes as this, the Court is conscious of the great and serious caution with which it is necessary to approach the inquiry whether a case is proved. Not every matter which would warrant resort to equity by one citizen against another would justify our interference with the action of a state, for the burden on the complaining state is much greater than that generally required to be borne by private parties. Before the Court will intervene the case must be of serious magnitude and fully and clearly proved.

Id. at 393.

While the Special Master says that the higher standard of proof is a "latecomer" in original actions, Special Master's Report at 66, the standard has been the rule that has guided the Court in all of its interstate water cases. *See, e.g., Missouri v. Illinois*, 200 U.S. 496 (1906). Furthermore, the time when a precedent was developed holds no particular bearing on the weight it carries. For example, the importance of the rights articulated first in *Miranda v. Arizona*, 384 U.S. 436 (1966), is not diminished because they were announced only some 36 years ago. The importance of the higher standard of proof is the reason the Court continues to apply it in contemporary interstate water proceedings.

E.g., Colorado v. New Mexico, 467 U.S. 310 (1984), *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993). Relaxing the standard would foster more frequent attempts by states to invoke the Court's original jurisdiction and dissuade states from attempting to resolve their differences without resorting to litigation.

In *Nebraska v. Wyoming, supra*, the Court discussed the difference between an action to enforce rights already adjudicated and an action to modify those rights. *Nebraska v. Wyoming*, 113 S.Ct. at 1694-96. In an enforcement proceeding, a plaintiff need show only a violation of those rights in order to prevail; a showing of injury is not required. 113 S.Ct. at 1695, *citing Wyoming v. Colorado*, 309 U.S. 572, 581 (1940). However, if a state seeks a new apportionment or a modification of an existing apportionment, no pre-existing right exists to enforce or interpret. 113 S.Ct. at 1695. In that case a state must make a showing of substantial injury to be entitled to relief. *Id.* at 1696.

> That is so not only because a new injunction would work a new infringement on sovereign prerogatives, but also because the interest of certainty and stability counsel strongly against reopening an apportionment of interstate water rights absent considerable justification.

Id. Wyoming urges the Court to continue to adhere to that precedent.

The Special Master suggests that in this case the standard should not apply because of Kansas' perceived disadvantage as a downstream state. Special Master's Report at 68-69. That observation is unsupported and

incorrect if it implies that only downstream states are plaintiffs in equitable apportionment cases. In *Colorado v. New Mexico*, 467 U.S. 310 (1984), Colorado, the upstream state, sought an apportionment of the Vermejo River. *Id.* at 312. In *Arizona v. California*, 460 U.S. 605 (1983), the upstream state, Arizona, was the plaintiff in a dispute to apportion the waters of the Colorado River. In pending proceedings before the Court, Wyoming has brought counterclaims against downstream Nebraska alleging Nebraska violations of the North Platte Decree. *Nebraska v. Wyoming*, No. 108, Original. Moreover, geography plays no role at all in other interstate disputes where the Court applies the higher burden of proof to limit the cases it considers under its original jurisdiction. *E.g., Wyoming v. Oklahoma*, 502 U.S. 437 (1992). Geography - or the law of gravity - has no bearing on whether to apply the higher standard of proof to decide whether to interfere with a state's sovereign rights.

CONCLUSION

This Court has applied a heightened standard of proof to its original jurisdiction cases between states in order to recognize and protect the dignity and sovereignty of the litigants. The Court should continue to apply the higher standard in interstate disputes within its original jurisdiction. To the extent the Special Master recommends a break from precedent, the Court should decline the recommendation.

Dated: November 17, 1994

Respectfully submitted,

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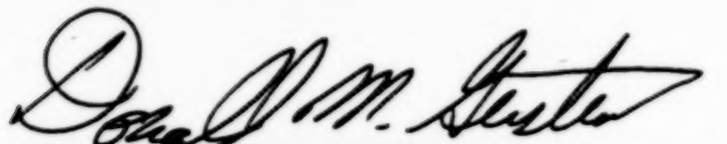

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